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DATE: February 1, 1999

CASE NO: 1998-ERA-37

In the Matter of

MARK GRAF,
Complainant,

v.

WACKENHUT SERVICES LLC,
Respondent.

ORDER RE: MOTION TO COMPEL AND DRAFTING PROTECTIVE ORDER

This case arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (the "ERA" or "Act"), and the regulations promulgated thereunder at 29 C.F.R. Part 24. This matter is set for a hearing on March 1, 1999 at 9:00 a.m., in Denver, Colorado. The pre-hearing deadline for completing discovery has been set for Friday, February 19, 1999.

On January 25, 1999, Complainant submitted a Motion to Compel Respondent to file answers to several interrogatories and document production requests, and to make two of Respondent's employees available for depositions. On January 26, 1999, Respondent filed a Response to Complainant's Motion to Compel. On January 27, 1999, Respondent filed a request for a protective order.

Interrogatories No. 8(m), 17; Requests for Production No. 5, 9, 10, 18

Complainant seeks an order compelling Respondents to answer Interrogatories No. 8(m) and 17, and Requests for Production No. 5, 9, 10 and 18. Respondent states that this motion is unnecessary because said documents have been, or are being, forwarded to Complainant's counsel. The Administrative Review Board "encourage[s] parties to make a good faith attempt to resolve discovery disputes without the intervention of an ALJ." Tracanna v. Arctic Slope Inspection Svc., 97-WPC-1 (ARB Nov. 6, 1997). The parties should continue to bear this precept in mind as they continue on their discovery course.

Since Counsel for Respondent agrees that these items are discoverable and is voluntarily working to produce said documents, it appears that the parties have resolved this discovery dispute. Therefore, Complainant's Motion to Compel Respondent to file answers to Interrogatories No. 8(m) and 17, and Requests for Production No. 5, 9, 10 and 18 is denied.

Depositions of Ron Leach and Gary Cupp

Complainant also requests an order compelling Respondent "to exercise due diligence" in making Ron Leach and Gary Cupp available for depositions prior to the discovery deadline. In response, Counsel for Respondent states that Mr. Leach is on medical leave due to surgery, and that Mr. Cupp is on paid leave, apparently related to an illness. Respondent's counsel has not objected to these requests for deposition and has agreed to notify Complainant when the witnesses are available.

On January 28, 1999, this office received two Stipulations and Orders Allowing Limited Discovery After Pre-Hearing Deadline signed by counsel for both parties. Therein, the parties agreed to extend the discovery deadline, should it become necessary, so that Complainant may depose Mssrs. Leach and Cupp. Although the discovery deadline has since been extended, due to the granting of a continuance, it appears that the parties have resolved this discovery dispute. Therefore, Complainant's Motion to Compel Respondent to make Mssrs. Leach and Cupp available for deposition is denied.

Request for Production No. 21

Complainant seeks an order compelling Respondent to answer Request for Production No. 21, which requests "copies of documents explaining disciplinary actions taken against any employees for violation of information release regulations." Counsel for Complainant has agreed to enter into a protective order to ensure that the privacy interests of the employees are kept secure.

Respondent argues that the Motion to Compel should be denied because its employees have a general "right and expectation of privacy to their employment matters, including disciplinary actions." Respondent bases its argument on case law from the Colorado Supreme Court. See e.g., Martinelli v. District Court, 612 P.2d 1083, 1091-93 (Colo.

1980). In the alternative, Respondent requests that the undersigned administrative law judge issue a protective order based on an in camera review of the employment records.

Relevancy

The test for determining whether material is discoverable is relevancy to the subject matter of the litigation. See Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980). There is no requirement that the information sought be admissible at trial. See Rich v. Martin Marietta Corp., 522 F.2d 333, 343 (10th Cir. 1975). Determinations on admissibility are made at trial. See Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 998 (10th Cir. 1965).

Courts have permitted a very broad scope of discovery in discrimination cases. "Since direct evidence of discrimination is rarely obtainable, plaintiffs must rely on circumstantial evidence and statistical data, and evidence of an employer's overall employment practices may be essential to plaintiff's prima facie case." Morrison v. City and County of Denver, 80 F.R.D. 289, 292 (D. Colo. 1978), citing Rich, 552 F.2d at 333.

However, "this desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the need and the rights of both [parties]." Burks v. Oklahoma Publishing Co., 81 F.3d 975, 981 (10th Cir. 1996). Clearly, this rule does not allow a party to "go fishing." Nevertheless, "[i]f the information sought promises to be particularly cogent to the case, the defendant must be required to shoulder the burden." See Rich, 522 F.2d at 343.

In this case, Complainant seeks records explaining the disciplinary actions taken against employees, other than Complainant, to establish his allegations of discrimination under the ERA. Complainant asserts that Respondent took disciplinary actions against him for disseminating information to the media and others. Moreover, Respondent asserts that any disciplinary action taken against Complainant was due to Complainant's alleged breach of its security measures. Respondent also argues that said information has been supplied through depositions and that the privacy interests of the employees must be protected.

In view of the foregoing, I find that the information in Request for Production No. 21 is directly relevant to the elements of Complainant's claim as well as Respondent's defense. While the information sought is sensitive and the kind that the other employees would expect to be

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held in confidence, Complainant's right to discover circumstantial evidence of discrimination outweighs the employees right to privacy. Moreover, the privacy interest may be protected by the issuance of a protective order.

Protective Order

While the need for information is held paramount, reasonable protective measures may be imposed to minimize the effect on the party making the disclosure. Title 29 of the Code of Federal Regulations sets forth Rules of Practice and Procedure which are generally applicable in administrative hearings before the Office of Administrative Law Judges. See 29 C.F.R. Part 18. Section 18.15 allows an administrative law judge to issue a protective order and provides in pertinent part:

> Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) The discovery not be had; (2) The discovery may be had only on specified terms and conditions . . . (4)Certain matters not relevant may not be inquired into, or the scope of discovery be limited to certain matters. . . .

29 C.F.R. § 18.15. An administrative law judge retains jurisdiction over a protective order as long as the order is in effect, which may continue even after the Secretary of Labor has issued a final decision. Holden v. Gulf States Utilities, 92-ERA-44 (Sec'y Apr. 14, 1995). Generally, the burden of preparing a protective order is on the party seeking to discover the information. See Morrision, 80 F.R.D. at 292.

As discussed above, the information sought in Request for Production No. 21 is sensitive and the kind that the other employees would expect to be held in confidence. Therefore, I find that the personal privacy of Respondent employees who are encompassed in Request for Production No. 21 should be respected. In order to protect the privacy interests of those employees whose files are produced, the parties are directed to enter into a confidentiality agreement.

For the reasons stated above, I conclude that the Complainant is entitled to discovery of the information in Request for Production No. 21. In view of the short time remaining before the formal hearing in this matter, Counsel for Complainant shall submit an appropriate protective order for my signature by Monday, February 8, 1999. Disclosure of the files is to be limited to Complainant's counsel and experts retained in this case, to the extent necessary for trial preparation, and the files are to be kept confidential. Complainant is to be prohibited from using these files for any purpose other than this action and copies of any files produced are to be maintained in counsel's custody.

In so concluding, I make no determination on the merits of the complaint filed by Mr. Graf. I make these rulings solely in the context of these motions.

Request for Protective Order for Deponents

Respondent also seeks a protective order requiring Complainant to keep confidential the names and other identifying information of Respondent employees that Complainant seeks to depose. In support of this motion, Respondent states that Complainant "has plastered this case on the Internet, including loading the complete deposition testimony of different Wackenhut employees." Respondent asserts that the sensitive nature of the information contained in these depositions, such as disciplinary actions taken against named employees, should be kept confidential.

The Secretary of Labor has noted that "litigants have general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are free to disseminate the information as they see fit." Holden v. Gulf States Utilities, 92-ERA-44 (Sec'y Apr. 14, 1995); see also, Oklahoma Hospital Ass'n v. Oklahoma Publishing Co., 748 F.2d 1421, 1424 (10th Cir. 1984). In order to guard against the possible dissemination of genuinely confidential documents, a party ordered to produce such documents may move for a protective order. See 29 C.F.R. § 18.15.

In view of the foregoing, I find that the issuance of a protective order is appropriate to shield employees of Respondent, who have been subject to disciplinary actions, from further embarrassment. The parties are directed to enter into an agreement to keep the information obtained at future depositions of Respondent employees confidential. In view of the short time remaining before the formal hearing in this matter, Counsel for Complainant shall submit an appropriate protective order for my signature by Monday, February 8, 1999.

ORDER

Accordingly, and based on the above, it is **ORDERED** that:

1. Complainant's Motion to Compel Respondents to file answers to Interrogatories No. 8(m) and 17, Requests for Production No. 5, 9, 10, and 18 is **DENIED**.
2. Complainant's Motion to Compel Respondents to make Ron Leach and Gary Cupp available for depositions is **DENIED**.
3. Complainant's Motion to Compel Respondents to answer Request for Production No. 21 will be **GRANTED UPON THE ISSUANCE OF A PROTECTIVE ORDER**. Counsel for Complainant is **ORDERED** to submit an appropriate protective order for my signature by Monday, February 8, 1999.

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4. Respondent's Motion for a Protective Order to keep information obtained at future depositions of Respondent employees confidential is **GRANTED**. Counsel for Complainant is **ORDERED** to submit an appropriate protective order for my signature by Monday, February 8, 1999.

Entered this 1st day of February, 1999, at Long Beach, California.

DANIEL L. STEWART
Administrative Law Judge

DLS: cdk